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IN THE

Supreme Court of the United States

October Term, 1926

No. 364

JOHN A. GROSFIELD AND RICHARD CAPLIS

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANTS

STATEMENT

The Circuit Court of Appeals for the Sixth Circuit certifies the following questions concerning the construction and validity of the padlock provisions of the National Prohibition Act printed below[1]. The facts

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[1]Act October 28, 1919, c. 85, Title 11. No. 21, 22, 41 Stat. 314.

§21. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provisions of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure or place shall be subject to a lien for and may be sold to pay all fines

under which the questions are presented are concisely stated in the certificate and no advantage is seen in restating them here.

Briefly, in ordinary warehouse premises in the business district of Detroit, officers discovered a still in operation. The landlords upon being notified of that fact immediately ousted the tenant who was responsible therefor, and leased the premises for legitimate business. Landlords acted in the matter with all reasonable diligence. No evidence was presented that attached to the premises there existed any trade tending to facilitate the maintenance of a nuisance, or that the premises in any manner constituted a continuing nuisance.

QUESTIONS CERTIFIED

1. Is it the intent of Section 22, Title 2, to authorize a court of equity to close for a year "or until otherwise ordered by the court," premises from which the landlord has ousted the offending tenant, and this in a case where the landlord had terminated the lease promptly after he first knew or was chargeable with notice that the tenant was using the premises for the manufacture or sale of intoxicating liquor?

2. If the first question is answered in the affirmative, then was such section in this particular a constitutional exercise of the legislative power?

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and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

§22. An action to enjoin any nuisance defined in this title may be brought in the name of the United State by the Attorney General of the United States or by any United States attorney or any prosecuting at-

ARGUMENT

SUMMARY

1. The esesntial question was decided in *Murphy v. United States .... U. S., ...* (Dec. 6, 1926) wherein it was held that the statute was limited to abatement. It contemplates a proceeding in equity which, if criminal, is impossible in view of Article 3, Section 2 of the Constitution and Amendment 6. Likewise civil penalties are excluded. *Constitution, Amendment 7; Garnharts v. United States, 16 Wall. 162; United States v. The Queen, 37 Fed. Cases No. 16107.*

Similar statutes were sustained only because limited in scope to abatement. *Littleton v. Fritz, 65 Ia. 488; Carlton v. Rugg, 149 Mass. 550; State v. Crawford, 28 Kan. 726; State v. Saunders, 66 N. H. 39; Muggler v. Kansas, 123 U. S. 623; Chase v. Proprietors of Revere House, 232 Mass. 88; People v. Holschuh, 235 Mich. 272.* And in two jurisdictions they were held unconstiutional as transcending abatement. *Heddon v. Hand, 90 N. J. Eq. 583; State v. Uhrig, 14 Mo. App. 413.*

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torney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidaivits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining

2. Upon the facts no necessity exists for invoking the statute. The reasons justifying abatement expounded in *United States v. Boynton, 297 Fed. 261,* do not exist here because there is no continuing nuisance.

3. No constitutional question is involved. The construction made in *United States v. Schwartz, 1 Fed. (2nd) 718* resolves the doubt on constitutionality expounded in *United States v. Lot 29.*

POINT 1

THE ESSENTIAL QUESTION PRESENTED WAS DECIDED IN MURPHY v. UNITED STATES

This court in *Murphy v. United States,* December 6, 1926, determined that the statutory provisions here involved were limited in scope to abatement. This is precisely the contention of the appellant and constitutes the essential question certified. The appeal was based upon the contention that the statute in question but authorized the exercise of a well known chancery power and was to be interpreted as providing merely the

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the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but, on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the

traditional and conventional process of a court of equity upon the subject of liquor nuisances. It was argued that the statutory power did not extend to proceedings in any sense criminal, both by reason of the language of the provisions and because of the constitutional necessity that crimes be tried before a jury (Article 3, Section 2 of the Constitution, and Amendment 6), which procedure the statute in no sense contemplates. Likewise the language of the statute excludes the intent to provide for proceedings which come within the purview of the Seventh Amendment to the Constitution, for if a penalty or forfeiture was contemplated, such proceedings are suits at common law within the meaning of that amendment. *Garnharts v. United States, 16 Wall. 162; United States v. The Queen, 37 Fed. Cases, No. 16107.* Historically similar statutes have been sustained only because the powers conferred were deemed to be limited to the abatement of particular nuisances. *Littleton v. Fritz, 65 Iowa 488; Carlton v. Rugg, 149 Mass. 550; State v. Crawford, 28 Kansas 726; State v. Saunders, 66 N. H. 39; Muggler v. Kansas, 123 U. S. 623; Chase v. Proprietors of Revere House, 232 Mass. 88; People v. Holschuh, 235 Mich. 272.*

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court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000 payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs and damages that may be assessed for any violation of this title upon said property.

In two jurisdictions similar statutes were held to be unconstitutional because it was considered that they were intended to confer criminal jurisdiction upon courts of equity. *Heddon v. Hand, 90 N. J. Eq. 583; State v. Uhrig, 14 Mo. App. 413.*

The first question certified raises the question of the scope of the statute. Its answer depends upon whether that scope is limited to justifiable acts for the purpose of abating the nuisance complained of. The case of *Murphy v. United States* asserts the principle that abatement and not penalty was contemplated. This principle needs but to be affirmed and applied in answer to the first question.

POINT 2

UPON THE FACTS STATED COMPLETE AND PERFECT ABATEMENT WAS HAD BEFORE THE ENTRY OF THE DECREE. THE DECREE ENJOINING ALL USE OF THE PREMISES FOR ONE YEAR IS SUPERFLUOUS AND UNNECESSARY AS ABATEMENT.

The provisions of law which authorize a court to prohibit for one year all use of premises upon which the nuisance in question has been conducted, are not to be understood as justifying useless, unreasonable and inequitable action. The character of abatement contemplated by the law is one known to the law. The creation of a novel field of jurisprudence was not intended.

It can always be argued that any kind of punishment in reaction to a liquor nuisance is of effect to prevent liquor nuisances generally. That is but to adopt the position that punishment prevents recurrence. An argument of this sort is answered by the fact that the abatement of a nuisance contemplated by the procedure

of a court of equity, to invoke which was the sole purpose of the statute, is limited to specific instances of nuisances and therein takes its distinction from the criminal law which aims to prevent generally recurrence of violations.

It is, of course, true that if landlords were visited with severe penalties if intoxicating liquors were found on their premises regardless of their fault, the class of persons vigilant to prevent violations of the Prohibition Act would be increased. But it is equally clear that to inflict a detriment as a general deterrent transcends the scope of an equity power to abate a nuisance as that power has been construed.

Since both the offending tenant and the offensive property had been removed the sole subject for consideration in the judgment was whether, attached to the premises there still remained especial availability by reason of their character or reputation which should require that all use be prohibited in order that the nuisance should cease.

It was asserted in *United States v. Boynton, 297 Fed. 261*, that premises may have such reputation or character that they are subject to being resorted to for unlawful purposes; and that to prohibit all use for a period of one year may be justified as necessary to perfect the abatement of the nuisance. The ultimate fact that the nuisance is a continuing one, or will be unless the remedy of prohibiting all use of the premises for a period of one year is applied, must be shown by evidence or rest upon a foundation of reason. *United States v. Boynton* is limited to the situation in which an established trade resorting to particular premises was found to exist. It is a rational presumption that Silver-

man, the tenant of the premises in question, manufactured liquor thereon for the purpose of sale, but there is no evidence of any sale having been conducted upon the premises, of any trade resorting thereto, of any notoriety which the premises had acquired. The absence of this evidence indicates that the place of distribution was elsewhere. Therefore the case here presented is one in which the premises were used as a place of secret manufacture. Any building will afford equal facilities.

It is doubtful whether the principle mentioned in *United States v. Boynton*, and seemingly approved in *Murphy v. United States*, can find any application to a situation like the instant one because there is no probability of nuisance continuation implicit in the character of the premises here. To find analogy between this case and the *Boynton case* it is necessary to depart from the consideration of the character of the premises and stretch the principle of the *Boynton case* so that it will extend to a searching of the mind of the person in control of the premises. We are not called upon to argue, nor is the court called upon to decide, whether the principle of the *Boynton case* can be so applied; for the complete vigilance and innocence of the owners necessarily limits the consideration to the character of the premises. Whatever mental element there was affecting the continuance of the nuisance was fully abated when the tenant Silverman was ousted by the landlords.

The first question, therefore, is directed to a situation in which all elements of nuisance are lacking. In substance the inquiry is whether the statute authorizes a court to declare the existence of a nuisance where none

exists; or to state the same thing differently, to prescribe a detriment by reason only of a past use of the property—to proceed against the property as an offender and to confiscate it. Regardless of whether this is possible, this statute does not contemplate anything beyond a bill in *equity* to abate, and a decree responsive to the facts proved.

POINT 3

NO CONSTITUTIONAL QUESTION IS INVOLVED

The second question depends upon an affirmative answer to the first question. We cannot contend that the statute provides for arbitrary action or that it provides for punishment, and if its scope is abatement as declared by *Murphy v. United States*, there can be no constitutional objection to its proper application. Our complaint is not directed against the statute but against its interpretation in this case.

It has been argued that this statute, when a nuisance is said to have existed, affords to the trial judge a discretion to dismiss the bill of complaint or to prohibit all use of the premises for a period of one year. We do not grasp the force of this argument, because the law was meant to be applied to situations existing in fact, and the duty of the judge is to apply the remedy as the facts require. Discretion implies the right to choose. No choice is presented and hence no discretion exists when the facts require a dismissal of the bill. Possibly where a continuing nuisance requiring abatement is shown, the trial judge has some degree of discretion as to the exact form of the remedy. The abuse of a power under the form of statutory authority is certainly not

contemplated by its terms. To sanction any kind of action under the phrase that, "Upon judgment of the court ordering such nuisance to be abated, the court may order that any building shall not be occupied or used for one year thereafter," is but to make sacred the form of language and to close one's eyes to the substance.

The constitutional objection exists only if the statute authorizes a court to regard the premises as an offender and to punish by confiscation. The constitutional objections are two-fold: (1) That such a proceeding is within the purview of the Seventh Amendment and hence jurisdiction in equity is excluded; (2) That the forfeiture of ordinary real property is so unreasonable as to lack due process of law.

The precedents for the forfeiture of property owned by innocent persons are stated by Mr. Justice Stone in *Van Oster v. Kansas, ... U. S. .... (Nov. 22, 1926).* The cases there cited are limited to personal property having special adaptability for unlawful uses (ships, vehicles, etc.) and real property devoted by the owner to uses under public regulation and hence subjected by him to special conditions and risks by reason of its special privileges (distilleries). It has never been decided that ordinary real property can be so forfeited. Such property is ordinarily leased to others for general business and residential purposes. Of it one cannot know in advance any possibility of unlawful use so that the owner may be said to part with the possession at his peril. However, this question is not deemed involved here.

The language of the statute has been construed as granting an arbitrary power in *United States v. Lot 29,*

296 Fed. 729. The opposing view, and the one which we maintain, is lucidly expressed in *United States v. Schwartz, 1 Fed. (2nd) 718.* We assume that this subject had full consideration in *Murphy v. United States* and we find it unnecessary to repeat an extended constitutional argument. It is clear that if the statute is construed to authorize only decrees justified by the facts and limited in scope to abatement, the first question here presented must be answered "No," in view of the facts of this case, and the second question is not reached. If the answer to the first question is "Yes," it must necessarily be with such qualifications as will indicate the impropriety of the decree in this case and as will render unnecessary an answer to the second question.

Respectfully submitted,

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Dated April 2, 1927.